LIBRARY
SUPREME COURT, U. S.

JAN 24 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

October Term, 1968

No. 673

ROBERT J. BROCKER,

Petitioner

v.

MARY ANN BROCKER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GALBREATH, BRAHAM, GREGG, KIRKPATRICK, JAFFE & MONTGOMERY,
Attorneys for Respondent

501-3 Mellon National Bank Building
Butler, Pennsylvania 16001

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.
Miss Anna McGlincy, Butler County Representative, Butler, Pa.

INDEX TO BRIEF

	Page
Jurisdiction	2
Counter-Statement of Questions Presented	3
Counter-Statement of the Case	4
Argument in Opposition to the Allowance of the Writ of Certiorari	7
Conclusion	13

TABLE OF CITATIONS

Cases:

Blackmer v. United States, 284 U.S. 421, 52 S. Ct. 252 (1932)	7
May v. Anderson, 345 U.S. 840, 73 S. Ct. 840 (1953)	12
Robb v. Pepper, 11 N.N.C. 497 (1882) (Pa.)	9
United States v. United Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677 (1947)	11

Miscellaneous:

Annot., 60 A.L.R. 2d 1244 (1958)	9
Pa. R.C.P. 233, 1027(2)	9

Case Caption

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1968

No. 673

Robert J. Brocker,

Petitioner

vs.

Mary Ann Brocker,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

JURISDICTION

The Petitioner has alleged that this Court has jurisdiction to review the decision of the Supreme Court of Pennsylvania in this matter upon Certiorari under 28 U.S.C.A., Section 1257(3). To come within the scope of that section, Petitioner has alleged breach of his rights under the Fourteenth Amendment to the United States Constitution relative to due process of law and that the Pennsylvania court violated the Fifth Amendment relative to full faith and credit in not recognizing judicial proceedings of a sister state.

Respondent respectfully denies Petitioner's allegations and specifically avers that the Supreme Court of Pennsylvania did not violate either the Fourteenth Amendment or the Fifth Amendment of the United States Constitution in disposing of Petitioner's appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In a civil contempt proceeding is procedural due process of law satisfied where service of a petition alleging contempt of court and a rule to show cause why the defendant should not be held in contempt is made upon an attorney of record who has appeared for defendant, filed papers in the case and who has taken an active part in other proceedings between the same parties, where the defendant at the time of service is outside the geographic boundaries of the court whose order is defied?

2. Is an order of court made after notice and opportunity to be heard a violation of the Fourteenth Amendment to the United States Constitution when it declares defendant to be in contempt of court and imposes a conditional penalty, unless defendant purges himself of the contempt within five days of the date of the order, and where defendant takes no action to purge himself of the contempt or to have the order modified; but merely alleges, dehors the record, on appeal, that the condition was impossible for him to fulfill?

3. Is an ex parte interlocutory order of the lower courts of Ohio, which is not a matter of record in a case before the Supreme Court of Pennsylvania, and which is raised in the first instance at that level of the proceedings, entitled to full faith and credit by the Pennsylvania Court under the Fifth Amendment to the United States Constitution?

COUNTER-STATEMENT OF THE CASE

This case involves an action in divorce begun in 1962 and related matters of custody and support of minor children. By various pleadings, petitions, written agreements and actions taken in regard thereto, Petitioner submitted himself to the jurisdiction of the Common Pleas Court of Butler County in regard to custody of his children. That court, by order dated October 15, 1964, as amended by order dated June 18, 1965, ordered custody of the parties' six minor children in respondent from September until June, and a portion of the summer school vacation was awarded to petitioner. In June 1966, in compliance with the orders of court, respondent delivered, and petitioner received, summer custody of the children. On August 9, 1966, while the children were still with the petitioner under the custody orders, petitioner, through counsel, presented a petition to the Court of Common Pleas of Butler County, requesting that the previous custody orders again be amended; upon this petition the court issued a rule returnable to October 11, 1966. Thereafter, in August, 1966, petitioner notified respondent and the lower court that he refused to return the children to respondent from his residence in Ohio.

At the same time a contempt proceeding concerning support payments which had been begun April 11, 1966, but which was continued until August 30, 1966, by request of petitioner was pending in the Butler County Court. Petitioner did not appear personally for the Au-

gust 30, 1966 hearing. However, he was represented by two attorneys of record. One of petitioner's attorneys appeared at the August 30, 1966 hearing and actively participated. At the end of this particular hearing, respondent presented a petition alleging contempt of court for the wilful disobedience of the order of June 18, 1965, and requested that a rule issue on petitioner to show cause why he should not therefore be held in contempt of court. The papers and rule were served upon counsel of record. A hearing was set for September 2, 1966, as the school term for the year 1966 was about to commence. Petitioner did not appear for the September 2, 1966 hearing. However, one of petitioner's attorneys of record did appear. The court continued the hearing until September 6, 1966, to grant additional time in which petitioner could appear. Counsel for petitioners was directed to notify forwarding counsel in Pittsburgh of the new time and date. Subsequently, after the hearing held on September 2, 1966, local counsel for petitioner advised the court that his client and co-counsel would not cooperate with him and would not appear, and he therefore asked leave to withdraw as counsel. This permission being granted only after local counsel assured the court that he had given notice of the September 6, 1966 hearing as directed by the court.

On September 6, 1966, at the time and place set, petitioner did not appear, nor was he represented by counsel. Therefore, the court declared him to be in wilful contempt of the court's order of June 18, 1965, and imposed certain conditional penalties to enforce compliance. The penalties were in the form of a $25,000.00 fine for the use of Butler County and an attachment for petitioner's

arrest. Both penalties were made contingent upon petitioner purging himself of the contempt within five days. Petitioner never attempted to purge himself of the contempt or to have the lower court modify its contempt order, based upon defective or inadequate notice or for any other reason.

Subsequently, when petitioner's appeal was before the Supreme Court of Pennsylvania he petitioned that court for a supersedeas. His request was granted provided he return the children as required by the June 18, 1965 court order. Petitioner refused to comply with the Supreme Court's condition and the supersedeas was vacated by the court. The contempt citation was affirmed and petitioner seeks review by this Court.

ARGUMENT IN OPPOSITION TO THE ALLOWANCE OF THE WRIT OF CERTIORARI

I.

In *Blackmer vs. United States,* 284 U.S. 421, 52 S. Ct. 252 (1932) it was held that,

> ". . . in proceedings to punish for contempt, the requirement of due process is satisfied by suitable notice and adequate opportunity to appear and to be heard."

This general rule must be applied to the facts of each case. In this case the facts clearly show that petitioner was given suitable notice and an adequate opportunity to appear and be heard. The record discloses the following facts.

Throughout the entire course of the divorce proceedings and related custody matters, the petitioner was represented by various attorneys, petitioner's two attorneys, at the time that the contempt order was made were from Pittsburgh and Butler County, Pennsylvania. The record shows that both the Pittsburgh attorney and the Butler attorney entered appearances in the Butler County Courts as counsel for the petitioner.

Prior to the entry in the case by these two attorneys, the court had scheduled a hearing for June 9, 1966, notice of said hearing having been served upon petitioner's then counsel of record. However, on June 8, 1966, a motion for continuance was made jointly by the Pittsburgh

and Butler attorneys for petitioner. The continuance was granted. The hearing was rescheduled for August 30, 1966. A subsequent motion to continue was submitted but denied on August 26, 1966. On August 30, 1966, the Butler attorney appeared at the hearing and actively participated on petitioner's behalf. Petitioner did not appear personally. At the end of the hearing on August 30, 1966, respondent presented petitions to the lower court requesting that a rule be issued upon petitioner to show cause why he should not be held in contempt for his wilful disobedience of the order of June 18, 1965.

The Court then ordered that the rule be made returnable on September 2, 1966, at 2:30 o'clock p.m. and that service be made upon the Butler attorney as local counsel for petitioner, which was accomplished. The Butler attorney appeared at the time set and reported that he had contacted the Pittsburgh attorney on September 2, 1966, but not petitioner personally. Therefore, at the request of counsel for petitioner, the court, in the presence of counsel for petitioner and in open court, rescheduled the matter for September 6, 1966 at 4:00 o'clock p.m. Subsequently, on September 2, 1966, the Butler attorney was granted permission to withdraw from the case by order of court made at 4:05 o'clock p.m. after notifying the Pittsburgh attorney, the other counsel for petitioner, of the hearing set for September 6th. On September 6, 1966, no attorney representing petitioner appeared, nor did petitioner appear personally for the contempt hearing.

Petitioner has argued that Butler counsel never gave notice to Pittsburgh counsel, or to petitioner, about the

pending September 6, 1966 contempt hearing. There is nothing in the record that supports this claim. The record indicates that the Butler attorney acting for petitioner acknowledged receipt of copies of the petitions for contempt and of the rule to show cause on September 1, 1966. The hearing was continued from September 2, 1966, until September 6, 1966, at the request of petitioner's Butler counsel. Before the Butler counsel was permitted to withdraw from the case, he assured the court he had notified Pittsburgh counsel of the September 6, 1966 hearing. Counsel now denies notice and claims petitioner was not granted due process of law as he was not present or represented when the contempt order was made. Petitioner's argument is not supported by facts of record. It is provided in the Pennsylvania Rules of Civil Procedure that service of petitions, rules, orders and notices may be made upon the attorney of record. Pa. R.C.P. 233; 1027(2).

Furthermore, in regard to the specific question of contempt proceedings, the general rule is that:

> "Where a party has been served with process and has appeared by attorney, and a decree or order has become binding on him, service of an order to show cause why he should not be punished for contempt thereof (or an order for an attachment) may be made on his attorney if the need to do so appears, as in the cases of absence from . . . within the jurisdiction . . ."

Annot., 60 *A.L.R.* 2d 1244 (1958);

Robb vs. Pepper, 11 N.N.C. 497 (1882) (Pa.).

Argument

In the case at bar, petitioner was represented by two counsel of record. Copies of the petition for contempt and orders of court pertinent thereto were served upon said counsel by direction of the court. To allow petitioner to escape punishment for wilful contempt of court due solely to an unsupported claim of lack of notice in light of the above would make enforcement of all orders in similar cases impossible. The guilty party would simply not appear for the hearing and have his counsel withdraw from the case.

II.

Petitioner has argued that the Pennsylvania Supreme Court denied him due process of law in upholding the conditional punishment for contempt, petitioner's argument being that it was impossible for him to comply with the condition. We disagree with this argument. The order for contempt imposed a $25,000.00 fine and directed an attachment for petitioner's person unless petitioner complied with the June 18, 1965 custody order within five days, of September 6, 1966. This time limitation was held to be reasonable in *United States vs. United Mine Workers of America,* 330 U.S. 258, 67 S. Ct. 677 (1947).

The record shows that the contempt order was served by certified mail on petitioner and counsel for petitioner, on September 7, 1966. The petitioner had only to return the children to respondent, required by the custody order, and he would have complied and would have thereby purged himself of contempt. We have already seen that the limitation of five days in which to perform was reasonable, and even that limitation was not incapable of modification if the petitioner had indicated a desire to purge himself of the contempt after the five day period, which he never did. Therefore, petitioner could have performed and purged himself of contempt so the condition was not impossible to accomplish and therefore not a denial of due process of law.

III.

Petitioner has also argued that Pennsylvania denied full faith and credit to a judicial proceeding in Ohio regarding the custody of the children. Petitioner alleged that the circumstances had changed from those in effect when the June 18, 1965 custody order was entered. And that he had commenced an action for custody in Ohio. However, when this case was before the Supreme Court of Pennsylvania no such proceeding or judgment rendered therefrom was part of the record before the Pennsylvania Courts. The petition filed in this court for a Writ of Certiorari disclosed that custody was granted to petitioner by Ohio on September 12, 1968. However, the Supreme Court of Pennsylvania disposed of this case by opinion and order dated March 15, 1968.

Furthermore, any order for custody that is obtained ex parte and without proper jurisdiction over the person of the party to be bound thereby is not entitled to full faith and credit in the courts of a sister state. *May vs. Anderson,* 345 U.S. 840, 73 S. Ct. 840 (1953).

Respondent never had been served by process for any custody proceeding in Ohio, nor had she appeared as a party to any such proceeding when the petitioner claimed an award of custody from Ohio at the time this case was before the Supreme Court of Pennsylvania. The only notice of any Ohio proceeding was that given by petitioner when he informed the respondent and the lower court that he would not return the children to respondent for the 1966 school term. To this day no exemplification or

evidence of any proceeding in the State of Ohio has been made a matter of record before the Common Pleas Court of Butler County. Likewise, none of the allegations in the brief and petition for certiorari regarding lack of notice, etc. have ever been introduced into evidence before the Butler County Courts upon any petition to rescind, modify or amend the contempt order. Upon the basis of the record as it stands the Pennsylvania Supreme Court decision did not violate any constitutional guarantee. Thus, the Pennsylvania courts did not violate Article IV, Section I of the United States Constitution in this case.

CONCLUSION

This case is one of purely personal interest to the petitioner and respondent and has no general public importance. The questions of whether or not petitioner was in contempt of court and therefore could be punished are the crux of the matters raised. This Honorable Court should deny the request for a Writ of Certiorari for the foregoing reasons.

Respectfully submitted,

GALBREATH, BRAHAM, GREGG, KIRKPATRICK, JAFFE & MONTGOMERY,
NORMAN D. JAFFE,
LEE A. MONTGOMERY,
Attorneys for Respondent